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In The

Supreme Court of the United States

OCTOBER TERM, 1946

No. 372

In the Matter of Proving the Last Will and Testament of
HENRY ALTMAYER,
Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,
Petitioner,

—vs.—

BEATRICE ALTMAYER RODNEY,
Respondent,

—*and*—

DONALD T. MULLANE,
Special Guardian.

PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

This is a petition for a writ of certiorari to review a judgment of the New York Court of Appeals embodied in the remittitur and decree entered thereon. An order on rehearing denied petitioner's motion for reargument and to amend the remittitur to recite constitutional questions raised.

In the contested probate proceeding below, petitioner propounded a copy of the last will and testament of Henry Altmayer deceased dated May 1, 1937. The Surrogate held that "The presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its nonproduction since the original was delivered to deceased." (R. 271), and denied probate. The Appellate Division reversed and admitted the will, holding that "the contestant claimed an intestacy by reason of the revocation of the will. The question was presented by contestant's claim that in 1939, in her presence, and in the presence of the witness Kelekian, the testator had destroyed the original will with the intent of revoking it" (R. 354). The Court of Appeals reversed, and affirmed the Surrogate's decree, "upon the ground that the findings of the Surrogate are in accordance with the weight of the evidence" (R. 359).

The proponent (petitioner here) offered the copy of the will and claimed the original was fraudulently destroyed during the lifetime of deceased or after his death (R. 12). The contestant came forward and explained proponent's nonproduction of the original will by showing its actual destruction by tearing, in 1939, in her presence and that of a witness. She pleaded revocation (Answer, par. "SECOND", R. 24). The defense of revocation was one of confession and avoidance; confession of the physical destruction of the will, and avoidance of the fraud by pleading and offering proof that decedent destroyed it by tearing, thereby revoking it. Both the Surrogate and the Court of Appeals were silent as to revocation.

The federal question involves a denial of due process of law in giving judgment on a defense other than that pleaded and proved. The relief granted contestant was not within the grounds relied on by her to obtain it. The case was tried on the issue of revocation and judgment given on presumed destruction animo revocandi, the latter having been neither

pleaded nor proved in the case. The principal ground relied on below and here by petitioner is that one may not go to trial on one defense and sustain judgment in his favor upon another, consistent with the due process clause of the 14th Amendment. The defense sustained must be in accordance with the allegations and the proofs. Due process requires that the pleadings notify the parties of the grounds upon which a defense is based and where the judgment is not responsive to the issues heard, petitioner is denied the benefit of his constitutional right to notice in that due process in its primary sense requires an opportunity to be heard. The right to such a hearing is one of the rudiments of fair play assured to every litigant by the 14th Amendment as a minimal requirement.

The doctrine of implied revocation does not exist in New York since the enactment of Section 34 of the New York Decedent Estate Law, which requires, in pertinent part, an actual physical tearing or destruction of the will "with the intent and for the purpose of revoking the same." As opposed to the *actual* physical destruction required by the statute, there exists in New York a *presumed* destruction animo revocandi. The presumption of destruction obtains only in cases where the will cannot be found after death, and arises from the fact that the will could not be found. *Schultz* v. *Schultz,* 35 N. Y. 653, 654.

It was neither pleaded nor proved that the will could not be found. There is no evidence in the record that the will could not be found after death. Both parties claimed actual destruction as distinguished from presumed destruction. The defense of revocation, as above stated, confessed the actual destruction but avoided the imputation of fraud by the pleading and proof of physical destruction by the testator himself.

No notice was ever given of any claim that after a search the will could not be found. The petitioner having thus

been deprived of notice to which he was constitutionally entitled had no opportunity to defend against such claim. The *fact in issue* in cases of presumed destruction is whether the will could not be found. The *fact in issue* in a case of revocation by physical destruction is whether the will was actually destroyed by testator, and the issue of law is whether the facts and circumstances surrounding the destruction establish the concurrent intent to revoke required by the Statute (Decedent Estate Law sec. 34). *Re White,* 106 Misc. 210.

In this case there was no claim that because the will could not be found, no one knew what had become of it. The contestant came forward in her pleading and proof and told what became of it. She said it was destroyed. The issue tendered, then, was whether the destruction worked a revocation satisfactory to the statute.

Moreover, the Court of Appeals reversed the finding of fact made by the Appellate Division "that the original of said will was not destroyed by decedent" (R. 282), thereby holding that the will *was* destroyed by decedent. Since the will was destroyed and it is stipulated that the will was a valid and duly executed will (R. 260) it follows as a matter of fact and of law, that the will was in existence up to the time the Court of Appeals found that the decedent destroyed it, because the decedent could not have destroyed the will unless it was physically in existence at the time he tore and destroyed it.

The controversy therefore concerned a will which was in existence up to the time it was destroyed, and not a will which could not be found.

The second federal question, involving equality of treatment under the equal protection clause of the 14th amendment, arises out of the refusal of the court below, in the face of the petition for rehearing which sharply brought the omission to its attention, to decide the question of law as to revocation presented upon the appeal without which the

litigation could not be *judicially* determined. The court below was under the positive duty and express mandate of the organic law; namely, the state constitution, to review such question of law, where the sole question of law, determinative of the litigation, was presented. The court below could not, consistant with the 14th amendment, assume jurisdiction, entertain the appeal and then omit and refuse to determine such question so presented.

The primary duty of the court below since the time of its creation was to review questions of law, to make uniform the law "for litigants and for all people." Instead of uniformity, it created the startling and anomalous precedent under which administration co-exists with the existence of a will (stipulated valid) which has never been declared revoked, thereby engendering confusion in the administration of decedent's estates, despite the supposed safeguard of section 34 of the Decedent Estate Law.

Every executor is accorded by statute the right to have his testator's will, which has been torn or destroyed, tested by the requirements of Section 34 of the Decedent Estate Law to determine whether the tearing worked a revocation. Petitioner was denied that right enjoyed by all others.

"It would be a curious and novel probate proceeding in which a Surrogate refused to consider at any stage evidence of revocation of a paper propounded" (*White's Will*, 106 Misc. 210, 174 N. Y. S. 424).

There was not alone a denial of justice but the court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

At the time of the appeal to the Court of Appeals there was an existing decree on remittitur of the Appellate Division admitting the will to probate. The federal question arose from the unanticipated disposition of the case at the close of proceedings upon the appeal in the Court of Ap-

peals. The first opportunity presented to petitioner to raise the federal questions was upon a rehearing.

On rehearing, petitioner specifically and categorically raised the federal questions of due process and equal treatment in his notice of motion (R.360) and in addition thereto as follows:

> "The failure of the Court of Appeals to determine such questions of law, and its failure to discharge its primary function and duty denies to respondents the equal protection of the laws of this state. It denies and abridges the rights, privileges and immunities and the due process of the law secured to respondents by Section 1 of the Fourteenth Amendment of the Constitution of the United States and by Article 1 sections 1 and 6 of the Constitution of the State of New York * * *. The issue presented by the pleadings and proof in all Courts, was whether there was a valid revocation of the will within the requirements of the statute. While the Surrogate was silent as to revocation, and made neither findings of fact nor conclusions of law in that regard, the Appellate Division held as a matter of law that the issue presented was one of revocation. * * * Since none of the parties pleaded or proved that the will could not be found, but the proof of both sides established actual as distinguished from presumed, destruction of the will, the finding of the Surrogate, as concurred in by the Court of Appeals, is not determinative of the issue presented, and there has been thus left open the determinative question of law as to whether or not, upon the proof, the destruction of the will worked a revocation within the requirements of the statute. * * * Proponent requests that the remittitur be recalled and amended so as to recite the constitution questions set forth in the notice of motion and raised in consequence

of the action heretofore taken by the court in disposing of the cause on the appeal, to the end that an adverse decision on this motion may be reviewed on Certiorari in the Supreme Court of the United States." (Brief on Rehearing, p. 12, 20, 22, 25-26).

Facts.

Briefly stated, the facts are as follows: Henry Altmayer, the testator, executed his will at proponent's (petitioner's) office on May 1, 1937, in the presence of contestant and three witnesses (R. 42). At the time, petitioner, who was nominated an executor and trustee thereunder, conformed a carbon copy to the original and retained the office copy (R. 43, 44). There was no other will or codicil (R. 260). The estate amounts to $300,000 in cash and securities. The will gave minor legacies to the testator's niece, his sister, and to a charitable institution. In chief, ⅓ or about $100,000.00 is bequeathed to petitioner, as one of the trustees, in trust, with income payable to contestant's daughter, then age 11, principal to be paid her at age 28, and ⅔ outright to contestant (R. 17-23). The executor is to run decedent's business.

Decedent died February 1, 1944, at age 76. He was bedridden for 6 months prior to death, during which time contestant controlled his business and had sole access to his vault (R. 113, 261). Some three weeks before death, on January 6, 1944, contestant called at proponent's office and told him she had just come from her father's vault, where she had been checking his securities, that she had seen the will there but had not read it carefully, and asked to see proponent's copy, which he showed her (R. 57-58, 120, 146). She asked if a copy could be used if the original were not produced (R. 59) and was informed that it could be if there were no objections. Proponent and his wife were close friends of contestant and they visited each other frequently

(R. 48). A cordial relationship existed between proponent and decedent (R. 46-47). The day after death he met contestant at the funeral parlors and told her it would be necessary to prepare probate papers. She said she would be down to his office in a few days to attend to the matter (R. 62). Subsequently, at proponent's request she gave him information for preparation of a petition to probate the will (R. 63). She never at any time told him that the will had been destroyed or revoked (R. 292), not even when he told her that he was preparing a petition for an order to open the vault to obtain the will (R. 148).

On February 11, 1944, she quietly commenced an administration proceeding in which she asserted she knew of no will and could find none. On learning of the administration proceeding, proponent notified the Surrogate that testator had executed a will in the presence of Mrs. Rodney who was then applying for letters of administration by a petition which stated she had no knowledge of any will of the decedent. The administration proceeding was thereupon promptly arrested by the Surrogate, and proponent commenced an abortive separate proceeding against her to compel production of the original will. Thereafter, proponent commenced the present probate proceeding and offered the conformed copy. The probate proceeding is separate and independent from the proceeding to compel production of the will and from the arrested administration proceeding. In this probate proceeding she did not claim the will could not be found, but pleaded and gave testimony of revocation. Her deposition in the proceeding to compel production of the will was received in the probate proceeding under stipulation (R. 259, 262). She testified she read the conformed copy at proponent's office in January 1944 (120, 146); that she knew of only one will, the propounded will (R. 131) and was present when it was executed (R. 119). *She did not look for the will in the vault after death* (292), but looked for the

will at decedent's apartment, and at his place of business (R. 144-5) and employed the assistance of decedent's nurses (R. 149) and of her attorney, Mr. Feinberg, in the search (R. 149) and her attorney made an independent search (R. 266), and that the last time she saw the will was when it was destroyed by decedent in 1939 in her presence and in the presence of one Kelekian (R. 340). In short, she employed the assistance of her attorney and of decedent's nurses in her search for testator's only will which she claims was destroyed in her presence five years previous to the search.

Her attorney's independent search raised the question whether Mrs. Rodney had informed him of the destruction. If she informed him, then he not alone assisted her in her search but made an independent search for the will which both he and contestant knew did not exist because it had been destroyed in her presence. If she did not inform him, she suppressed from her own attorney the most vital factor in the litigation, namely her explanation of what became of the will at decedent's death at a time when she had sole access to the vault where it was deposited. When proponent asked her if the will was in the vault, she answered "Ask me no questions and I will tell you no lies" (363). Mrs. Rodney filed an answer to the petition in the probate proceeding in which she pleaded "That the said paper is not the last will and testament of decedent, in that it was during his lifetime duly revoked by him", and thereby issue was joined as to revocation of the will. She could have consented to probate, but elected instead to contest the minor bequests and the bequest to her daughter.

The good faith of proponent in the proceeding has been repeatedly adjudicated by the Surrogate in his decisions on related proceedings in the litigation. In contrast the Surrogate regarded her with suspicion and stated that her speech and conduct "leave her open to grave suspicion" (R. 271). The Court of Appeals confirmed the Surrogate's findings.

Nevertheless, decedent's will, stipulated valid, and never revoked, has been denied probate, and contestant, whose conduct in connection with the will has been judicially declared to leave her open to grave suspicion, has been permitted to establish intestacy under which she is sole distributee.

Jurisdiction.

1. January 18, 1946 is the date of the judgment (remittitur of the Court of Appeals) and March 23, 1946 is the date of the decree entered on the remittitur to be reviewed. Application for reargument (rehearing) was duly filed April 8, 1946 and denied April 18, 1946.

2. The statute under which jurisdiction is invoked is sec. 344(b) of the United States Code (Judicial Code Sec. 237, amended).

3. Jurisdiction attaches and certiorari lies within the rule enunciated and applied by this Court in the following cases:

Standard Oil Co. v. *Missouri,* 224 U. S. 270, 287;
Brinckerhoff-Fariss Co. v. *Hill,* 281 U. S. 673, 678;
Reynolds v. *Stockton,* 140 U. S. 254, 264, 265;
Windsor v. *McVeigh,* 93 U. S. 274, 282;
Coe v. *Armour Fertilizer Works,* 237 U. S. 413, 426;
Washington Railroad v. *Bradleys,* 77 U. S. (10 Wall) 299, 303;
Horey v. *Elliott,* 167 U. S. 409, 446.

Questions Presented.

I. (a) Was it a denial of due process of law for the Court below to give judgment on a defense other than that pleaded and proved?

(b) Was there a denial of fair play and due process of law for the Court below to grant contestant relief which was not within the grounds relied on by her to obtain it?

(c) May a litigant, consistent with the due process clause of the 14th amendment, go to trial on one defense and sustain judgment in her favor upon another where the defense sustained is not in accordance with the allegations and the proofs?

(d) Was petitioner deprived of his constitutional right to notice and the opportunity to defend where neither the pleadings nor the proof raised the defense upon which judgment was given?

(e) Did the court below have jurisdiction to give judgment upon presumed destruction animo revocandi where there was no claim that the will could not be found and no evidence to support a finding that the will could not be found?

II. (a) Was petitioner denied the equal protection of the law where the court below omitted and refused to decide the only and determinative question of law presented when the court is under the duty and the mandate of the State Constitution to decide such questions of law?

(b) Once the Court of Appeals reverses a finding of fact that "the original of said will was not destroyed by decedent" thereby holding that he did destroy it, could the Court, consistent with the equal protection clause of the 14th amendment, omit and refuse to decide the question of law thereby presented as to whether such destruction worked a revocation within the requirements of Decedent Estate Law section 34?

III. Was there a departure from the usual course of judicial proceedings such as to require the supervision of this Court?

IV. May this Court review the findings of fact.

Reasons Relied Upon for the Allowance of the Writ.

1. The relief granted contestant was not within the grounds relied on by her to obtain it; it was not responsive to the issue tendered nor was it in accordance with the allegations and the proofs. There was neither notice to petitioner nor opportunity to be heard. As such it was a denial of fair play and a departure from the usual and accepted course of legal procedure.

2. The decision of the Court of Appeals in giving judgment on a defense other than that pleaded and proved is in conflict with the applicable decisions of this Court, of the Federal courts and of the New York courts.

3. The decision of the Court of Appeals exceeded its jurisdiction and its refusal to decide the question of law as to revocation, even after rehearing, was arbitrary and constituted a denial of justice.

4. The presumption of destruction animo revocandi arises from the fact that the will could not be found and there is no evidence to sustain a finding that the will could not be found.

5. There is a question of public importance in that the Court of Appeals, in the place of uniformity and settled law, has injected confusion into the administration of decedent's estates in that some decedents are accorded the benefits of the statute on revocation and others are denied it, under this precedent where administration co-exists with the existence of an unrevoked valid will. As to some litigants the statute is indiscriminately abrogated.

Prayer for Writ.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the Surrogate's Court, New York County, State of New York, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the judgment and decree on remittitur of the Court of Appeals be reversed and the resettled order of the Appellate Division dated the 4th day of October 1945 be affirmed; and that the petitioner be granted such other different and additional relief as may seem proper.

Dated: New York,
July, 1946.

EDWIN B. WOLCHOK,
Counsel for Petitioner.

LAWRENCE S. TIMEN,
Of Counsel.

In The

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Emil H. Wasserberger,

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—vs.—

Beatrice Altmayer Rodney,

Respondent,

—and—

Donald T. Mullane,

Special Guardian.

BRIEF IN SUPPORT OF PETITION

Statement.

The facts, so far as this application is concerned, are sufficiently in the petition. The grounds upon which jurisdiction is invoked, the claims advanced, the rulings made

and the cases believed to sustain jurisdiction, are likewise set forth at length in the petition.

Opinions Below.

The opinion of the Surrogate is not officially reported but appears in full in the record (R. 271). The opinion of the Appellate Division of the Supreme Court is officially reported in 269 App. Div. 837, 56 N. Y. S. 2d 101 and appears in the record (R. 354). The opinion of the Court of Appeals is officially reported in 295 N. Y. 693, 65 N. E. 2d, 333. The opinion of the Court of Appeals on rehearing is officially reported in 295 N. Y. 894, 67 N. E. 2d 525 and is incorporated in full in the Remittitur, printed in the record (R. 359).

Relevant Provisions of Statute Involved.

Decedent Estate Law, section 34. Revocation and cancellation of written wills.

> No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

Specification of Errors.

The Court of Appeals erred as follows:

1. In giving judgment on a defense other than that pleaded and proved.

2. The relief granted contestant was not within the grounds relied on by her to obtain it in that judgment was given upon implied destruction animo revocandi whereas the pleading and proof of contestant was revocation and she relied upon an actual physical destruction by tearing as effecting a revocation within the requirements of Decedent Estate Law, sec.34.

3. The defense sustained was not in accordance with the allegations and the proofs.

4. There was no notice given petitioner of any claim that the will could not be found, and the court thus denied petitioner fair play and an opportunity to be heard.

5. The doctrine of implied revocation does not exist in New York since the enactment of Decedent Estate Law, sec. 34.

6. The presumption of destruction animo revocandi arises from the fact that a will cannot be found, and there is no evidence to support a finding that the will could not be found.

7. Once the Court of Appeals reversed the 4th finding of fact of the Appellate Division that "the original of said will was not destroyed by decedent" thereby holding that decedent *did* destroy his will, the court was under the express and positive duty to decide the question of law presented as to

whether such destruction worked a revocation satisfactory to the statute. The court could not be silent as to revocation and could not affirm the Surrogate's decree which was also silent as to revocation without denying petitioner equality of treatment.

ARGUMENT

POINT I.

The decision of the Court of Appeals in giving judgment upon a defense other than that relied upon in the pleadings and proof is in conflict with the applicable decision of this Court.

The burden of this point is that it was a denial of due process of law to grant contestant relief which was not within the grounds relied on by her to obtain it and which was not responsive to the issue tendered and heard.

The Issue Below.

The issue of revocation was squarely tendered. In answer to petitioner's claim that the will was fraudulently destroyed (R. 12) the contestant pleaded revocation (R. 24):

> "That the said paper is not the last will and testament of Decedent, in that it was during his lifetime duly revoked by him."

and her proof was that the revocation was effected by a physical destruction by tearing of the will. She testified to the tearing (R. 340, 350) and gave supporting proof thereof by the witness Kelekian (R. 178, 215-216).

The defense of revocation was confession and avoidance of petitioner's claim of fraudulent destruction, admitting

the destruction but avoiding the fraud by the plea and proof that testator tore the will with intent to revoke it.

Contestant testified she knew of only one will (R. 131). The stipulation (R. 260) admits that the will is a valid will, duly executed by a competent testator and that there is no codicil nor any other will of the testator (R. 260).

"In every instance there is a *prima facie* presumption that a testamentary disposition once made, or a testamentary intent once entertained, continues until the contrary is shown." *Re Crouse's Will,* 205 App. Div. 135, 199 N. Y. Supp. 833, 839.

Since, apart from that presumption, the answer sets up revocation, and contestant offered proof of destruction by tearing in 1939 (R. 178), it follows from the stipulation that testator's only will is conceded to be valid and in existence up to the time of the destruction claimed.

Therefore the only question before the Court was whether such destruction by tearing constituted a revocation of the will within the requirements of the statute (Decedent Estate Law, Sec. 34).

Effect of Decisions Below.

The Surrogate was silent as to revocation. He held that "the presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its non-production, since the original was delivered to deceased" (R. 271).

The Appellate Division, however, was articulate on the subject and defined the issue by stating the nature of contestant's claim, declaring (R. 354):

> "The contestant claims an intestacy *by reason of the revocation* of the will. The question was presented by contestant's claim that in 1939, in her presence and in the presence of the witness Kelekian, the testator had

> destroyed the original will with the intent of revoking it." (Italics ours.)

and admitted the will to probate. With the issue thus defined and judicially settled, petitioner had no occasion to anticipate that the Court of Appeals would dispose of the appeal by sustaining a defense neither pleaded nor proved, upon grounds not relied upon by contestant to obtain the relief granted. Nevertheless, the Court of Appeals reversed:

> "upon the ground that the findings of the Surrogate were in accordance with the weight of the evidence"

and thereby, the Court of Appeals not alone disregarded and was silent on the issue of revocation, but affirmed the Surrogate's decision that the "presumption of destruction *animo revocandi* attached to the instrument of 1937".

But the presumption of destruction *animo revocandi* obtains only in cases where a will, proved to exist, cannot be found after death of the testator, and that presumption arises from the fact that the will could not be found. Thus, in *Schultz* v. *Schultz,* 35 N. Y. 653, 654, the Court said:

> "If the will had remained in the custody of the testator, or it had appeared that after its execution he had access to it, the presumption of law would be, *from the fact that it could not be found after his decease*, that the same had been destroyed by him animo revocandi." (Italics ours.)

The record shows that there was no issue in the pleadings or proof that the will could not be found. Indeed, contestant's concession (R. 292) would exclude it. There was no claim made in this case that the will could not be found, nor did the contestant in her pleading or upon the trial give any notice of any such claim.

So that when the Court below, which was silent as to revocation, affirmed the Surrogate's decree "on the ground that the Surrogate's findings are in accordance with the weight of the evidence", and the Surrogate (who was likewise silent as to revocation) found that "the presumption of destruction animo revocandi attaches to the instrument of 1937," judgment was given upon a finding devoid of any evidence to support it, and upon an issue neither pleaded nor proved, and of which no notice was given, and which was not within the grounds relied on by contestant.

Having in mind that the doctrine of implied revocation does not exist in the State of New York since the enactment of Decedent Estate Law, sec. 34 *Crounse's Will,* 168 Misc. 359, 6 N. Y. S. 2d 32, 35; *Mortensen's Will,* 157 Misc. 717, 284 N. Y. S. 420, 425), and having in mind that "all presumptions of law in favor of a party must be consistent with his allegations. None will be indulged for his benefit in opposition to them" (*Andrews* v. *Chadbourne,* 19 Barb 147) and also that even if she properly had the benefit of the presumption it merged in her proof of destruction (*U. S. Trust Co.* v. *Frelinghuysen,* 262 App. Div. 259, 28 N. Y. S. 2d, 448, 450) it remains to inquire whether the Court below, in giving judgment not responsive to the issue tendered, deprived petitioner of due process of law and whether the decision below is in conflict with the decisions of this Court.

Decisions of This Court.

This Court has repeatedly held that where the judgment is not responsive to the issue tendered and where there is no notice, there is a denial of due process and the judgment is void. In *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281, this Court declared:

> "The Federal question is whether, in that Court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that *the notice and the hearing should correspond*, and that the relief granted should be appropriate to that which had been heard and determined *on such notice*. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based." (Italics ours)

At page 287 of the *Standard Oil* case the Court further said that such a judgment in effect deprives the party of the benefit of his constitutional right to notice.

The question here presented is pointed-up in the most forceful language in the case of *Reynolds* v. *Stockton,* 140 U. S. 254, 264, 265, 269, 270, where the Court defined the fundamental principles involved as follows:

> "And without amendment of the pleadings, a judgment for the recovery of the possession of real property, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made on the defendant. The invalidity of the judgment depends on the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

This Court in the *Reynolds* case also quoted with approval the decision in a New Jersey case that "a judgment upon a

matter outside the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard." In concluding its opinion, this Court there observed that the relief sought was the subjection of a fund to certain claims, and then remarked: "No valid judgment could, therefore, be rendered therein which went beyond the subjection of this fund to those claims."

This Court enunciated the same principles in the earlier case of *Windsor* v. *McVeigh*, 93 U. S. 274, 282, where it was said that in cases where judgments were not within the relief sought, the judgments "would not merely be erroneous: they would be absolutely void; because the court rendering them would transcend the limits of its authority".

Again in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 426, this Court said that to render judgment upon a matter not within the pleadings and not in fact litigated "is contrary to fundamental principles of justice."

In the case of *Washington R. R. Co.* v. *Bradleys*, 77 U. S. (10 Wall) 299, 303, this Court stated that:

> "* * * the allegations and the proofs must agree, that the Court can consider only what is put in issue by the pleadings, that averments without proof and proof without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

Following the decision in the *Washington R. R.* case, the Courts have uniformly declared that "the purpose of pleadings is to notify the parties of the grounds upon which a recovery is sought or a defense is based" and that the "defense sustained must be in accordance with the allegations and the proofs" (*Moffit-West Drug Co.* v. *Byrd*, 92 Fed. 290, 291) and further that "the relief granted must be

within the prayer for relief and *within the grounds alleged and relied on to obtain it.*" (*Eddy & Bissell Live Stock Co.* v. *Blackburn,* 70 Fed. 949, 954), and that one may not "go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense", nor may he "deny in his answer the plaintiff's averments and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings" (*Castle* v. *Persons,* 117 Fed. 835, 843).

These principles are deep rooted, salutary and well settled, and obtain in the forum state as well. "It is a fundamental law of pleading and of evidence that the proof must follow the allegations of the pleadings and plaintiff can only recover upon the cause of action stated in his complaint" (*Woolsey* v. *Trustees,* etc., 69 Hun 489, 23 N. Y. S. 410). In that case judgment was given for negligence on proof of a defective drain when the pleading claimed negligence in the collection of water in a hole in the sidewalk. The judgment was reversed upon the principles here in question. See also *Dewey* v. *Moyer,* 72 N. Y. 70, 77; *Reed* v. *McConnell,* 133 N. Y. 425, 429. See also *Burton* v. *Platter,* 53 F. 901.

The claim here is that there was a denial of due process in giving judgment on a defense not relied on, and on an issue not pleaded or proved. But it goes further. There was no notice, no opportunity to be heard, and a denial of fair play. In *Brinkerhoff-Farris Co.* v. *Hill,* 281 U. S. 673, 678, due process "in its primary sense" is defined as "an opportunity to be heard and to defend its substantive right."

Not only was judgment given on an issue of which no notice was given, but both the Court of Appeals and the Surrogate ignored the issue of revocation which was in fact litigated. This constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. In *Matter of White,* 106 Misc. 210, 174 N. Y. S. 424, the Court stated:

"It would be a curious and novel probate proceeding in which a Surrogate refused to consider at any stage evidence of revocation of a paper propounded."

This is not alone a curious and novel probate proceeding, but the action of the court was such as to deprive the petitioner of fair play in its constitutional sense. As stated by the Court in *National Labor Relations Board* v. *Phelps*, 136 Fed. 2d 562, "the right to such a hearing is one of the 'rudiments of fair play' (citations) assured to every litigant by the 14th Amendment as a minimal requirement (many citations). There can be no compromise on this footing."

It was not enough that contestant's pleading and testimony as to revocation was received by the Court. The claim of revocation could not be ignored. This Court has said, in the case of *Morgan* v. *United States*, 304 U. S. 1, that: "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The proceeding below, in short, was such as to deprive petitioner of a trial according to the accepted course of legal procedure.

Court proceedings are not merely private controversies: the public is always interested in the proper administration of justice. See *N. Y. Central R. R.* v. *Johnson*, 279 U. S. 310, 318.

It has been adequately demonstrated that the presumption of destruction *animo revocandi* arises from the fact the will could not be found (*Schultz* v. *Schultz, supra*). The Surrogate found that such presumption attached to the will although there was no evidence that the will could not be found, which could support such a finding. This is contrary to the decisions of this Court as will be observed from the

case of *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 247 U. S. 464, where this Court said:

> "This Court will review and correct the error of a state supreme court, in assuming a state of facts without any support in the record as a basis for denying asserted federal rights."

Petitioner asserted those federal rights at the first opportunity on rehearing and a clear case exists requiring this Court to correct the error below.

Moreover, a federal right was denied, namely due process, as a result of such finding without evidence to support it; and the conclusion of law and the federal right are so closely intermingled that a decision on the federal requires a review of the findings of fact. *Fiske* v. *Kansas*, 274 U. S. 380, 385; *Creswill* v. *Grand Lodge etc.*, 225 U. S. 246, 261.

It is abundantly clear from the foregoing that the court below overstepped the bounds of its jurisdiction, and denied petitioner the due process of law secured to him by the 14th amendment, and for these reasons a review of the judgment complained of is in all respects indicated.

POINT II.

Petitioner was denied the equal protection of the law.

The Court of Appeals reversed the finding of fact made by the Appellate Division "that the original of said will was not destroyed by decedent" (R. 282), thereby holding that the will *was* destroyed by decedent. Since the will was destroyed and it is stipulated that the will was valid (R. 260) it follows as a matter of fact and of law that the will was in existence up to the time the Court below found that the decedent destroyed his will, because the decedent could

not have destroyed the will unless it was physically in existence at the time he tore and destroyed it.

Once the Court of Appeals holds there was a destruction of a valid will, a question of law simultaneously arises, namely: Did such destruction work a revocation of the will within the requirements of section 34 of the Decedent Estate Law which defines when and how there may be a valid revocation?

Having entertained the appeal and assumed jurisdiction thereof, the court needed to decide the issue of law thereby presented or it could not *judicially* determine the litigation. The Court of Appeals is under a positive duty and the express mandate of the organic law, namely, the state constitution, to review such question of law. The *raison d'etre,* the basic and whole function of the Court of Appeals from the time of its creation has been to review questions of law to the end that the law of the state be settled and uniform.

There could be no conclusive determination in this case in the absence of a decision of the question of law regarding revocation.

The decision of the Court of Appeals in this case has created no format which could serve as a guide in parallel litigation. On the contrary, the existence of administration with the co-existence of a valid will which has never been declared to be revoked is opposed to the statutes and the adjudicated cases. The Court of Appeals then, did not "settle the law."

No testator can be certain, in looking to the decision of the Court of Appeals in this case for authority, that he could defeat intestacy by the making and execution of a valid will.

The Court of Appeals is the creature of the Constitution of 1846. It becomes appropriate to inquire as to the reason for its creation and the nature of its jurisdiction.

In the reports of the New York State Constitutional Convention Committee, Vol. IX, the Committee at page 161 stated:

> "The jurisdiction of the Court of Appeals was given special consideration by the convention of 1894. The judiciary committee, in its report, viewed the existence of a Court of Appeals superior to the appellate tribunals, which first reviewed the decisions of the trial courts, to be occasioned by the necessary functions of settling and making certain the law not only for the litigants but for all people (Lincoln, Volume III, page 349).
>
> 'Inasmuch as the volume of business necessitates the division of the Appellate Division into four separate tribunals it is deemed necessary that there should be a superior court to settle the law. * * * It is this necessity alone which justifies the existence of a Court of Appeals superior to the appellate tribunals which first review decisions of trial courts. But for this the whole difficulty could readily be solved by abolishing the Court of Appeals and constituting strong appellate courts whose judgment should be final (Revised record Volume II, p. 893).'
>
> The Court of Appeals according to the Committee's report was to be strictly limited *to its province of reviewing questions of law* (except in capital cases) leaving the judgment of the Appellate Division upon all questions of fact * * *.
>
> (p. 179) The 1921 Convention stated it had no desire to change the *nature* of the jurisdiction of the Court of Appeals from a tribunal reviewing solely questions of law to one reviewing facts as well. * * *
>
> (p. 675) As to the jurisdiction of the Court of Appeals, the Convention has appreciated that it should

> continue to be essentially a court of law, and it has provided only two exceptions. One of these exceptions is where the judgment is of death and this exception has long existed. The other exception, which is new, but was proposed by the Constitutional Convention of 1915, has been proposed as a matter of justice within the principle of allowing a litigant at least one appeal on the facts" (Italics ours).

It is thus to be observed that before any consideration was ever given to enlarging the power of the Court of Appeals as to questions of fact, the primary purpose for which the Court of Appeals was created and the authority with which it was endowed was to review only questions of law to settle and make uniform the law "for litigants and for all people."

A useless formality may not be imputed to the framers of the constitution. To "review questions of law" was never intended to mean that the Court could assume jurisdiction by entertaining an appeal and then not decide the determinative question of law presented. It was never intended that the determination as to whether the question of law was to be decided should rest in whim or caprice. Otherwise the law would not be made uniform "for litigants and for all people."

In considering the nature and purpose of its jurisdiction, it is necessary to look to the constitution before questions of fact were permitted to be considered, and at such time, the review of an appeal without deciding the question of law involved would not alone have been an empty gesture but would have rendered nugatory the controlling provisions of the organic law.

The constitution imposed its mandate upon the Court of Appeals and placed it under the positive duty to decide questions of law presented on the appeal, a duty which the court itself recognized, as will hereinafter be shown.

The grant of additional power to the Court to review also questions of fact, in certain limited cases, in no way served to relieve the Court of its duty to review determinative questions of law. The additional power granted merely added a duty to that already existing.

The Court of Appeals has itself heretofore declared that it is under a duty to review questions of law. The Court of Appeals has recognized and acknowledged its duty in that regard in the case of *National Harrow Co.* v. *Bement & Sons* (1900), 163 N. Y. 505, 508. In that case the Court observed that the grant of additional power to the Court of Appeals to review, in certain cases, questions of fact, had been removed by the new constitution effective January 1, 1895, which limited the Court of Appeals to the review of questions of law. The Court, however, took occasion to point out what the duty of the Court of Appeals was at the time when the Court of Appeals had power to review both questions of fact and questions of law prior to the limitation contained in the then new constitution effective 1895. At page 508 the Court stated:

> "Formerly, therefore, it was the *duty of this Court* where there was a reversal upon the facts to review the question of fact as well as the question of law. * * *"

Since the creation of the Court, then, the duty of the Court of Appeals, under the organic law of the state, was to review questions of law, where the jurisdiction and power of the Court of Appeals was extended, as it now is, to give it power and jurisdiction to review questions of fact and it was also the duty of the Court of Appeals, "to review the questions of fact as well as the questions of law", which is but another way of saying that the questions of law must be reviewed. This duty, then, is one which the Court of Appeals must discharge "for all litigants and for all people".

The failure of the Court of Appeals to determine such questions of law, and its failure to discharge its primary function and duty denies to petitioner the equal protection of the law.

To conclude, therefore, if the Court of Appeals had reversed the Appellate Division without giving any ground for the reversal, or if it had reversed the Appellate Division upon the ground that the destruction of the will and the declarations of the decedent established a revocation of the will within the requirements of the statute, such a decision, even if manifestly erroneous, would be both a state matter and a matter of state law with which this Court would have little concern. But when, in the absence of notice, it gave judgment on a defense neither pleaded, proved, nor relied on by contestant, and then refused to remedy the defect on rehearing, it plainly violated petitioner's constitutional rights arising and asserted under the Fourteenth Amendment, and that is a federal question requiring review and correction by this Court.

CONCLUSION.

It is respectfully submitted that the petition for Writ of Certiorari in this case should be granted.

Respectfully submitted,

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